United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

76-7616

United States Court of Appeals

For the Second Circuit

In Re FRANKLIN NATIONAL BANK SECURITIES LITIGATION

ROBERT GOLD, on behalf of himself and on behalf of all others similarly situated,

Plaintiff-Appellant,

and

LOUIS PERGAMENT,

Intervenor-Plaintiff-Appellant,

against

ERNST & ERNST, HAROLD V. GLEASON, PAUL LUFTIG, PETER R. SHADDICK, MICHELE SINDONA, CARLO BORDONI, HOWARD D. CROSSE, ANDREW N. GAROFALO, DONALD EMRICH, and ROBERT C. PANEPINTO,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' PETITION FOR REHEARING OR IN THE ALTERNATIVE FOR REHEARING EN BANC

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Defendant-Appellees,

APPELLANTS' PETITION FOR REHEARING OR IN THE ALTERNATIVE FOR REHEARING EN BANC

Preliminary Statement

In April 1978, this Court issued a decision in this appeal, remanded the case to the district court for further proceedings, and retained jurisdiction of the appeal. In re Franklin National Bank Securities Litigation, 574 F.2d 662, 676 (2nd Cir. 1978). In a ruling of great

importance to securities class actions, the Court held, inter alia, that individual notice to the record owners of securities would be insufficient individual notice under Rule 23 of the Federal Rules of Civil Procedure. Despite "deficiencies of proof of basic facts" (Id. at 674), the Court found that "it is already clear that most if not all of ...[the] beneficial owners can be identified with reasonable effort." Id. at 672. In consequence the Court held that the class representatives have the responsibility of identifying the beneficial owners of securities purchased in nominee name. Ibid.

The Court further held that under Rule 23 the class representatives are responsible for the cost of identifying beneficial owners. Ibid. However, the Court significantly qualified this holding by stressing that class representatives might well be able to shift such costs to nominees in subpoena proceedings and by encouraging class representatives to bring such possibility to the attention of the nominees before issuing subpoenas. Id. at 675. Recognizing that certain brokerage houses "may have adopted too rigid a position relative to reimbursement" (Id. at 673), the Court emphasized the importance of identification procedures which would prevent or discourage unreasonable or exorbitant demands for reimbursement. Id. at 672-676.

Subsequent to the Court's decision, significant developments have occurred which show that factual assumptions and conclusions of law which were essential to this Court's decision were erroneous. First, the additional record compiled according to this Court's suggestions* shows that the Court erred in assuming that the great bulk of non-broker nominees would respond voluntarily to letters requesting the identity of the beneficial owners. (SA 6-7)** See Id. at 675. Consequently the Court's conclusion that "most if not all of the beneficial owners can be identified by reasonable effort" should be reexamined.

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* At plaintiffs-appellants' request, the District Court has approved certain additions to the record on appeal and has ordered that the record on appeal be transmitted to this Court in connection with the proposed filing of this petition. The additions to the record on appeal include an affidavit of Jerome M. Congress ("the Congress affidavit") which describes the efforts made by the class representatives to identify beneficial owners and summarizes the results of those efforts (Record, Gold v. Ernst & Ernst Docket No. 321); the various exhibits to the Congress affidavit, including the list of potential nominees prepared by defendants, the letters mailed to nominees requesting identification of beneficial owners, and the responses to such letters (See Record, Gold v. Ernst & Ernst Docket No. 321); and transcripts of relevant District Court proceedings.

** "SA" references designate pages in the Supplemental Appendix of Plaintiffs-Appellants being filed together with this Petition. As shown below, a minimum of 194 non-broker nominees have not responded to letters mailed to them by the class representatives. (SA 7)

Second, plaintiffs believe that Oppenheimer Fund, Inc. v. Sanders, ___ U.S.___, 98 S.Ct. 2380 (decided June 19, 1978) ("Sanders") prohibits the use of subpoenas to obtain information concerning the identities of beneficial owners for the purpose of mailing class notices. The Court should reconsider its decision in light of Sanders, since the Court's decision relied heavily on the assumption that subpoena procedures could be utilized to obtain such information and to assure an equitable allocation of identification costs.

Plaintiffs-Appellants ("plaintiffs") submit that such developments render rehearing by the panel appropriate. Alternatively, plaintiffs request rehearing en banc in light of the widespread importance of the Court's decision for securities class actions generally, the failure of any other Court of Appeals to impose on class representatives the special burdens imposed by this Court's decision, and the existence of considerable prior authority holding or indicating that individual notice to record owners of securities is sufficient under Rule 23.*

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* See, e.g., cases cited at pp.23-29 and 39-40 of the Brief for Plaintiffs-Appellants previously filed in this Appeal.

Development of a More Complete Record Pursuant to This Court's Suggestions

(a) Steps Taken to Identify Beneficial Owners Of Nominee Name Securities

In its decision, the Court suggested a set of procedures to be followed in identifying the beneficial owners. Those procedures included the mailing of letters to potential nominees, one follow-up mailing, and the use of subpoenas to deal with nominee brokers who refused to respond or who insisted that they be reimbursed for identification costs. 574 F.2d at 674-75.

Pursuant to this Court's suggestion, in May 1978 plaintiffs mailed court-approved letters to the 664 companies defendants had identified as potential nominees, asking such nominees to furnish the names and addresses of the beneficial owners. (SA 2-3, 11-12) After further communications with the District Court in June and July, a second wave mailing was sent in August 1978 to the 469 companies on the nominee list from which responses had not yet been received. (SA 3-4, 13-19) The Congress affidavit describes plaintiffs' additional efforts to identify beneficial owners. (SA 4-5).*

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* Such activities included efforts to obtain current addresses for potential nominees by retaining a firm which specializes in locating class members in securities class actions and by telephoning the nominees themselves. (SA 4-5)

(b) Results Of Plaintiffs' Efforts To Identify the Beneficial Owners

Responses have been received from 326 of the companies named on the nominee list and from 52 additional persons and companies not specifically named on the list, as against 664 companies on the list. (SA 5)* As of January 12, 1979, responses had not been received from 194 out of 492 non-brokers and from 92 out of 172 brokers.** (SA 6-7)

Plaintiffs have received 13 requests for reimbursement of identification costs, all of which requests are from brokers. (SA 7-9, 34-85) Considerable variation exists among brokers in the amount of reimbursement requested and in the formula utilized for computing identification charges: thus, estimated or actual charges have ranged from $70 to

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* The nominee list (see Exhibit I to Gold v. Ernst & Ernst Docket No.321 in the Record on Appeal) was prepared from Franklin New York Corporation transfer records by counsel for defendant Ernst & Ernst, and includes as possible nominees all registered owners which appear to be businesses. (SA 3) Plaintiffs' counsel have written the letter "R" next to the name of each company on the list from which a response is known to have been received, the letters "BR" next to each company which counsel for plaintiffs and defendants have identified as a broker, and the letters "BK" next to each company identified as an apparent bank. (SA 7)

** The response figures may be even lower than that stated above, since the above figures include responses from 45 non-brokers and 7 brokers not specifically named on the list (SA 5,7), some of which companies may have been beneficial owners rather than nominees.

$747 for a complete search, and from $5 per hour to $25 per hour where companies stated that they were unable to estimate the total cost. (SA 7-8, 34-85)

Finally, certain responses indicate that the nominees involved have a policy of keeping the names of their customers confidential. Apparently for that reason, at least 29 nominees seek to retransmit the notice themselves rather than sending a list of the names of beneficial owners to plaintiffs. (SA 9, 20-33)

Plaintiffs' decision not to serve subpoenas on non-responding companies was predicated on two grounds: (a) plaintiffs' belief that they have no power to serve such subpoenas under the Sanders decision, and (b) the record of responses to plaintiffs' letters, which record revealed that so many subpoenas would be required in so many different jurisdictions as to render an effort to subpoena all such companies unreasonable.

ARGUMENT

THE COURT'S DECISION SHOULD BE RECONSIDERED IN LIGHT OF MATERIAL DEVELOPMENTS OCCURRING SUBSEQUENT TO THE DECISION WHICH SHOW THAT THE DECISION WAS PREDICATED ON ERRORS OF FACT AND LAW

(a) The Decision is Predicated on an Erroneous Assumption With Respect to the Difficulty Of Identifying the Beneficial Owners

In its decision, the Court assumed that non-broker

nominees--which constituted 492 of the 664 companies identified as possible nominees -- would be willing to furnish the names and addresses of the beneficial owners without being subpoenaed. 574 F.2d at 674-75. In fact, a minimum of 194 non-brokers have failed to respond.

If the Court's decision requires plaintiffs to initiate subpoena proceedings against non-responding companies whether or not they are brokers -- a group which would include 194 non-brokers and 112 brokers in 39 different states and 111 different cities (not including nominees in Canada and England)* -- that decision imposes a stupendous burden on class representatives.** Plaintiffs submit that such a burden is not required by Rule 23(c)(2), which mandates individual notice only to those class members who can be identified "through reasonable effort." Consistent with this analysis, the Supreme Court in Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950), required only that individual notice be "reasonably calculated to

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* See nominee list, Exhibit I to Gold v. Ernst & Ernst Docket No. 321 in Record on Appeal.

** The burden would be particularly severe with respect to subpoenas of companies not residing in the Southern or Eastern Districts of New York. Plaintiffs would have to arrange for numerous attorneys practicing in districts across the country to have multiple subpoenas issued and served, to make their offices available for depositions, and to retain reporters for the depositions. If subpoenas were disregarded, plaintiffs would have to prosecute numerous enforcement proceedings in various districts throughout the country in Courts which are unfamiliar with the litigation and which would have to be provided with extensive information concerning the relevant facts and law.

reach those who could easily be informed." Id. at 319 (emphasis added).

(b) The Court's Decision Should Be Reconsidered In Light Of The Subsequent Ruling Of The United States Supreme Court in Oppenheimer Fund, Inc. v. Sanders

1. Under Sanders, Plaintiffs May Not Serve Subpoenas to Obtain The Identities Of Class Members for the Purpose of Mailing The Notice Of Pendency Of Class Action

In Sanders, supra, the Supreme Court held that the federal discovery rules may not be used to obtain the identities of class members for the purpose of preparing the list of persons to whom class notices will be sent. The Court reasoned that such information does not fall within the scope of Rule 26(b), since it is not relevant to any issue in the case. 98 S. Ct. at 2389-92.*

While Sanders did not specifically deal with the issuance of subpoenas, the Supreme Court's analysis is applicable and controlling with respect to subpoena proceedings. Rule 45(d) limits deposition subpoenas to production of documents "which constitute or contain matters within the scope of the examination permitted by

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* The Supreme Court specifically stated that "There is a distinction in principle between requests for identification of class members that are made to enable a party to send notice and requests that are made for true discovery purposes." 98 S.Ct. at 2391, n.20.

Rule 26(b)," and deposition testimony pursuant to subpoena is limited to matters discoverable under Rule 26(b). The Advisory Committee's Note to the 1970 amendments to Rule 45 states that "the scope of discovery through a subpoena is the same as that applicable to Rule 34 and the other discovery rules." 48 F.R.D. 543 (1970). See also, 4A J. Moore, Federal Practice ¶34.02[1], p.34-13 and n.1 (2nd Ed. 1978).

Since the names and addresses of class members would not be subject to subpoena under the Supreme Court's analysis in Sanders, plaintiffs should not be required to serve subpoenas on non-responding nominees.

Nor would class members' identities be discoverable by utilizing a bill in equity in aid of discovery as an alternative to a subpoena. Virtually obsolete since enactment of the Federal Rules of Civil Procedure,* the bill for discovery has been limited to obtaining information relevant to proving plaintiff's case on the merits or establishing

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* Questions have been raised concerning the extent to which bills for discovery may be utilized subsequent to enactment of the Federal Rules of Civil Procedure. See generally 4 J. Moore, Federal Practice ¶26.53 (2d Ed. 1976); 8 Wright & Miller, Federal Practice and Procedure, §§2005, 2201 (1975); E.R. Sunderland, Discovery before Trial under the New Federal Rules, 15 Tenn. L.R. 737, 740 (1939).

defenses thereto.* Under the approach taken in Sanders, the class members' identities are not relevant to any issue in the action and in consequence would not be discoverable through a bill for discovery. Furthermore, as an independent civil suit involving complaint, answer, and numerous other aspects of a full scale litigation, the bill for discovery would be an involved and cumbersome procedure which would require an unreasonable effort of plaintiffs even if it could otherwise be used to identify the beneficial owners. See 4 J. Moore, Federal Practice ¶26.03[1], pp.26-82

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* E.g., Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U.S. 689, 693 (1933); Keith v. Endicott Johnson Corp., 75 F.2d 249, 250 (2d Cir. 1935); Lansing B. Warner, Inc. v. Lehigh Valley R. Co., 75 F.2d 483, 485 (2d Cir. 1935); Pressed Steel Car Co. v. Union Pac. R. Co., 241 Fed. 964, 967 (S.D.N.Y.1917). Thus, while the bill could be used to identify the person who should properly be named as defendant---an issue directly related to proof of plaintiff's claim (e.g., Petition of LaPlaca, 8 F.R.Serv. 33.8 (S.D. N.Y. 1945)--- the bill could not be used to ascertain the identity of witnesses because such an inquiry was not directed to the "ultimate facts material to the issue [in the case]." Keith v. Endicott Johnson Corp., supra.

to 26-83; ¶26.53, p.26-104 (2nd Ed. 1976).*

2. The Court Should Reconsider Its Decision In Light of the Unavailability of Subpoena Procedures As a Means Of Effectuating the Fair and Reasonable Allocation of Identification Costs

This Court regarded as "serious and disturbing" the prospect that brokerage houses might create obstacles to the prosecution of proper class actions by charging class representatives excessive fees, and recognized that certain brokerage houses may have adopted "too rigid a position relative to reimbursement." 574 F.2d at 672-74. The Court held that the solution to this problem lay in the district court's discretion to require brokers to bear identification costs in a subpoena proceeding. Id. at 675.

Absent the power to subpoena brokers, however, plaintiffs have no mechanism for bringing brokers before the Court so that the appropriate allocation of the costs

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* In light of Sanders, relief under the All Writs Act, 28 U.S.C. §1651 (1966), is likewise unavailable to plaintiff. Prior the adoption of the Federal Rules in 1938 subpoenas were the very writs authorized by the All Writs Act (then 28 U.S.C. §377) for securing production of documents from non-parties. 5A J. Moore, ¶45.05[1], p.45-26 (2d ed. 1977). Such subpoenas were at least as restrictive in scope as their Rule 45 counterparts in that they were limited to evidence material to proof of plaintiff's case. See Nelson v. United States, 201 U.S. 92, 114 (1906). See generally, Note, Pre-Trial Production of Documents in the Federal Courts, 26 Va. L. Rev. 796, 797-800 (1940).

involved, and the fairness of the charges assessed by the brokers, can be determined. As noted above, the brokers who have requested reimbursement as a condition of providing names and addresses diverge significantly in the amounts they propose to charge and the basis upon which such charges would be computed. (SA 7-8, 34-85)* Under such circumstances, requiring plaintiffs to automatically pay brokers whatever amounts are requested to obtain the identities of beneficial owners would be so unfair as to impose an unreasonable effort on plaintiffs.**

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* Furthermore, the use of similar form letters by several of the brokers which have requested reimbursement suggests that certain brokers are seeking to organize a common effort to resist disclosure of the identities of beneficial owners unless class representatives pay whatever amounts are requested by brokers. Compare SA 34, 38, 41, and 43.

** Nothing in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) ("Eisen IV") or Sanders suggests that class representatives may be required to pay unreasonable or exorbitant charges to effect individual notice. If anything, Sanders indicates that this Court may have erred in failing to consider the economic burden of identification costs as a relevant factor in determining whether the beneficial owners could be identified by reasonable effort. Contrary to the interpretation of Eisen IV in this Court's opinion (see 574 F.2d at 668-69, 670, 672), Sanders stressed that Eisen IV had not dealt with a class representative's responsibility with respect to identification costs. 98 S.Ct. at 2389, 2392. Sanders itself held that district courts have discretion to allocate identification costs to persons other than the class representatives (Id. at 2392-94), thereby suggesting that the District Court may properly take identification cost considerations into account in structuring a fair and reasonable notice program.

(c) Further Clarification of The Decision Requested

Finally, plaintiffs request that the Court clarify its decision with respect to the procedures to be followed when a nominee which prefers to keep its customers confidential states that it will mail the notice to the beneficial owners. (SA 9, 20-33) Plaintiffs believe that in such a context the "reasonable effort" requirement is fulfilled if the nominee does not disclose the names of its beneficial owners but advises plaintiffs in writing that it has mailed the notice to all beneficial owners revealed by a search of its records.

CONCLUSION

For the reasons given above, the Court should reconsider its decision on this appeal and rule that (a) plaintiffs are not required to serve subpoenas or conduct discovery over and above the discovery they have performed to date with respect to nominees who have failed to provide the names and addresses of their beneficial owners in response to letter requests; (b) plaintiffs are not required to reimburse nominees for their alleged identification costs in the absence of any mechanism for determining a fair allocation of such costs between the class representatives and individual nominees; (c) plaintiffs need not obtain the names and addresses of beneficial owners whose

nominees inform plaintiffs in writing that they will transmit the class notice to all their beneficial owners. Alternatively, the Court should rule that notice to record owners of Franklin New York Corporation securities is sufficient individual notice under Rule 23. Having made such ruling, the Court should remand the matter to the District Court for proceedings consistent with this Court's opinion.

Dated: New York, New York
February 27, 1979

Respectfully submitted,

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STATE OF NEW YORK)
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PATRICIA K. COLE, being duly sworn, deposes and says that she is in the employ of Milberg Weiss Bershad & Specthrie, attorneys for the within plaintiff herein, and is over the age of 21 years. That on the 1st day of March, 1979, she served 2 copies of the within PETITION FOR REHEARING OR IN ALTERNATIVE FOR REHEARING EN BANC upon the attorneys for the respective parties named below, by depositing a true copy of the same to each of them, securely enclosed in postpaid wrappers in a post office box regularly maintained by the United States Government at One Pennsylvania Plaza, New York, New York, directed to each of them at their respective addresses set forth below, those being the addresses within the State designated by them for that purpose on the preceding papers in this action, or the places where they then kept their respective offices between which places there then was and now is a regular communication by mail:

SEE ATTACHED LIST

Patricia K. Cole
Patricia K. Cole

Sworn to before me this

1st day of March, 1979.

Patricia E. McLafferty
Notary Public

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